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In the Supreme Court of the United States

OCTOBER TERM, 1941

B. W. COYLE, C. G. LONG, MARY ST. CLAIR, SEWELL & SEWELL, a Co-partnership Composed of L. N. Sewell and ——— Sewell, ALBERT ZEPP, CHAS. W. LENOU, R. E. HOBBS, PERRY C. BURKS, CRAWFORD M. JAMES, W. S. JAMES, T. M. JAMES, HELEN JAMES DUNLAP and VASSIE JAMES HILL ET AL.,

Petitioners,

VERSUS

W. B. SKIRVIN, Individually and as President, O. W. SKIRVIN, Individually and as Vice-president, M. A. LUTY, Individually and as Secretary-Treasurer and ELLSWORTH JORDAN and F. C. WALLOWER, Individually and as Members of the Board of Directors, Respectively, of American Oil and Refining Company, an Oklahoma Corporation, MRS. PEARL R. MESTA, MRS. GEORGE TYSON, Formerly MRS. M. S. Adams, TEXAHOMA REALTY COMPANY, SKIRVIN OPERATING COMPANY, SKIRVIN HOTEL, Incorporated, and BROADWAY DEVELOPMENT COMPANY, Oklahoma Corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

W. H. BROWN,
HARVE L. MELTON,
JAMES E. ANDERSON,
Attorneys for Petitioners.

March, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, B. W. Coyle, and the others above named represent that:

JURISDICTIONAL STATEMENT

This is a minority stockholders' class or derivative suit originally brought in the State District Court of Oklahoma County, State of Oklahoma on April 11, 1938. On May 11, 1938, certain of the defendants in the original suit filed their petition for removal and sufficient bond, to the United States District Court for the Western District of Oklahoma. Transcript of the proceedings in the state court were duly filed in said federal court and the original plantiffs filed their motion to remand to the state court. On October 6, 1939, the federal District Court overruled the motion to remand. Thereafter the plaintiffs filed their Amended and Supplemental Complaint and later their Second Amended and Supplemental Complaint. The defendants all filed their motions to dismiss this complaint. On April 12, 1941, the federal trial court entered its judgment dismissing the complaint.

From this judgment, the plaintiffs below appealed to the United States Circuit Court of Appeals for the Tenth Circuit. On the 8th day of January, 1942, the Circuit Court of Appeals entered its judgment affirming the judgment of the trial court. On the 6th day of February, 1942, your petitioners as appellants below filed their petition for rehearing which was on the 12th day of February, 1942, overruled.

This petition is filed under the provisions of the Judicial Code, Sec. 240 as amended, Sec. 347(a) of Title 28 U. S. C. A., providing for the issuing of writs of certiorari to review judgments of Circuit Courts of Appeal.

STATEMENT OF ISSUES

This is a minority stockholders' class or derivative suit, originally filed in the District Court of Oklahoma County, State of Oklahoma, on the 11th day of April, 1938. It was brought and joined in by several hundred minority stockholders of the American Oil & Refining Company, an Oklahoma corporation whose 20 year charter had expired on February 5, 1936, but whose affairs had never been wound up. The suit was brought in behalf of the named plaintiffs and of all the stockholders who might want to accept the benefits of the action. There being no authority under the Oklahoma statutes to sue a dissolved corporation, the corporation itself was not made a party (Appendix 1). The former officers and directors of the corporation, who are by statute made the trustees of the dissolved corporation, were all made defendants. Joined with these defendants were the majority or controlling stockholders, consisting both of certain individuals and certain other corporations owning corporate stock.

The complaint charges that these majority stockholders and officers and directors, acting in conjunction, were guilty of most flagrant violations of their fiduciary duties (R. 28-29), by which, continuously and systematically, throughout the life of the corporation and until the filing of

the suit, they all enriched themselves at the expense of the corporation by fraudulent diversions and appropriations of the property of the corporation and by secret profits, in immense sums aggregating millions of dollars, although the exact amount cannot be ascertained except by an accounting.

The plaintiffs below prayed that the defendants be required to account for all of these fraudulent enrichments and to make restitution of the same or the value thereof and that the affairs of the dissolved corporation be finally wound up by the court and distribution made of all such sums recovered as well as any other assets that might be found, after the payment of debts, if any.

The complaint also discloses that in May, 1934, the defendants caused to be organized another American Oil and Refining Company under the laws of the State of Nevada (R. 81-91). To avoid confusion due to the identity of names, this latter corporation is referred to in all of the pleadings and in the opinions of the courts as the "Nevada Corporation," and the original corporation as the "Oklahoma Corporation."

It was the plan of the defendants to transfer all of the assets of the Oklahoma Corporation to the Nevada Corporation and for the latter to issue its stock to the stockholders of the Oklahoma Corporation. It is conceded that such transfer would not be legal without the unanimous consent of the stockholders of the Oklahoma Corporation. Approximately 872 stockholders of the Oklahoma Corporation refused to surrender their stock for cancellation and to accept

stock in the Nevada Corporation (R. 87). These stockholders were scattered through some thirty-five states. It is also conceded that there is no statutory authority in Oklahoma for the consolidation of corporations and that the transfer of all of the assets of one corporation to another, formed for that purpose, does not dissolve the former but that it continues to exist as a separate entity until its charter expires.

Notwithstanding the failure of the minority stockholders to consent to the transfer of assets, the officers of the Oklahoma Corporation, although not making any general assignment, did assign the oil and gas producing properties to the Nevada Corporation, and, thereafter, pretending to act as the officers and directors of the Nevada Corporation, continued to operate said properties as the property of the Nevada Corporation (R. 84) and continued their fraudulent practices until all of the assets of material value were dissipated.

As alleged in the complaint, the plaintiff minority stockholders first receiving information to arouse their suspicions of the irregularities of the defendants about January, 1938 (R. 97), began a diligent investigation of the affairs of the company. While thus engaged, the Globe Pipeline Co., a creditor of the Nevada Corporation filed its suit in the United States District Court of the Western District of Oklahoma, being case No. 2050 (frequently referred to in the record by number) against the Nevada Corporation and W. B. Skirvin on March 19, 1938. On the same day, by agreement between the plaintiff, the Nevada

Corporation and W. B. Skirvin, A. C. Fletcher was appointed as receiver of the Nevada Corporation and apparently took possession of such tangibles as remained in the hands of the Nevada Corporation. The trustees of the Oklahoma Corporation were not made parties to said suit and no attempt was made to appoint a receiver for the affairs of the dissolved Oklahoma Corporation.

As already recited this case was filed about three weeks later on April 11, 1938. On April 14, 1938, the state District Court in this case, upon a full hearing, appointed E. F. Lester as receiver for the dissolved Oklahoma Corporation. It is evident from the order making the appointment (R. 15-17) that the court took over and assumed full control of all of the affairs of the dissolved Oklahoma Corporation for the purpose of completely winding up its affairs as prayed for in the complaint, to the complete exclusion of the statutory trustees who were specifically found guilty of neglect of their duties in that respect.

This case retained the status above described until May 11, 1938, when it was removed to the Federal Court.

On April 29, 1938, while the case was still in the state court, these same trustees who had been thus removed, all defendants in this case and all charged with fraud, to which charges they had not answered, and without the knowledge or consent of the state court, filed amendend articles of incorporation with the Secretary of State purporting to revive the corporation and extend its life 20 years (R. 101-103) and put themselves back in control as officers and directors (R. 201). On the same day, the Globe Pipe Line Co., a

creditor of the Nevada Corporation and plaintiff in case No. 2050, wherein A. C. Fletcher had already been appointed receiver for the Nevada Corporation, filed its amended bill in said case No. 2050, asking that the "revived" Oklahoma Corporation be made a party defendant in that case and that a receiver for the "revived" Oklahoma Corporation be appointed (R. 104). This culminated in the appointment of A. C. Fletcher as receiver for the "revived" Oklahoma Corporation.

As already recited, thereafter, on May 11, 1938, one of the defendants in this case filed her petition and bond for removal to the federal court. The plaintiffs in the state court filed their motion to remand. This motion to remand was not overruled until October 5, 1939 (R. 235). Thereupon, these petitioners as plaintiffs in the removed case filed their Amended and Supplemental Complaint and later their Second Amended and Supplemental Complaint (R. 24-113), hereinafter referred to as the "complaint."

The supplemental complaint detailed the attempt of the removed trustees to revive the Oklahoma Corporation without the consent of the state court having charge of its affairs at the time and called attention to the appointment of a receiver in case No. 2050 for the Oklahoma Corporation while the receivership over its affairs still existed in the state court (R. 104) and asserted its invalidity (R. 104). It was also alleged in the supplemental complaint that during the long interval between the filing of the motion to remand and the overruling of this motion, various of the defendants in the state court had intervened in case No. 2050 and were attempting to have adjudicated all matters

between themselves and the Oklahoma Corporation, including the issues in this case (R. 105). These petitioners in their supplemental complaint prayed that the court protect its jurisdiction over the subject matter of this suit and the issues therein by decreeing the invalidity of such removal and by enjoining said defendants from presenting their claims against the Oklahoma Corporation in any other case except this case (R. 112).

All of the defendants below filed their motions to dismiss the complaint.

The trial court below refused to recognize the validity of the appointment of the receiver of the dissolved Oklahoma Corporation by the state court in this case and refused to appoint a successor upon the receiver's death on July 26, 1940 (R. 245).

On April 12, 1941, the trial court entered its judgment dismissing the Second and Supplemental Complaint and for costs against these petitioners. In the opinion of the trial court it was held that the minority stockholders of the Oklahoma Corporation were without authority in the first instance to institute this suit, the sole authority to institute said suit being in the receiver of the Nevada Corporation (Conclusion 4, R. 233).

From this judgment, these petitioners appealed to the United States Circuit Court of Appeals for the Tenth Circuit.

ASSIGNMENTS OF ERROR

On the 8th day of January, 1942, the Circuit Court of Appeals for the Tenth Circuit rendered its opinion and judgment affirming the action of the trial court in dismissing your petitioners' Second Amended and Supplemental Complaint (R. 240-248).

Your petitioners believe and therefore assert that the Circuit Court erred, in its conclusions of law upon which it based its judgment, in the several particulars set out below, and that said errors not only conflict with the decisions of other Circuit Courts of Appeal in the same matter but that said errors constitute a radical departure from the accepted and usual course of proceedings in such matters:

First Assignment of Error

The court erred in sustaining the validity of the attempted revival of the Oklahoma Corporation by the deposed trustees, purporting to act as the former officers and directors of the dissolved corporation, on April 29, 1938 (R. 246), at a time when the state district court had taken over the affairs of said dissolved corporation for the purpose of winding up its affairs, having actually assumed such charge through its receiver.

Second Assignment of Error

The court erred in upholding the validity of the proceedings in federal case No. 2050 for the appointment of another receiver for the Oklahoma Corporation, begun on

April 29, 1938, while the custody of all of its affairs were being administered by the state court through its receiver.

Petitioners say that the conclusions of law set forth in both the first and second assignments of error are contrary to the following decisions of other circuits and contrary to the many cases cited in said opinions:

Louisville Trust Co. v. *Knott,* 130 Fed. 820 (Eighth Circuit).

Chillicothe Furniture Co. v. *Revelle,* 14 Fed. (2d) 501 (Eighth Circuit).

Hartman v. *Masters,* 269 Fed. 483 (Court of Appeals, D. C.).

Adams v. *Mercantile Trust Co.,* 66 Fed. 617 (Fifth Circuit).

The courts of other circuits in these cited cases announce the positive rule that when a suit is filed in a court of competent jurisdiction to wind up the affairs of a dissolved corporation, from the time of service of process, such court assumes complete jurisdiction and control over all of the affairs of such corporation. That the affairs under its control include not only its physical assets but all claims by or against the corporation and all controversies that may arise in the course of liquidation. That this control is in the court rather than in the receiver and is independent of the actual appointment of the receiver or of his physical possession of property. That this control is exclusive and withdraws such matters from the control of every other court of coordinate jurisdiction and is not a mere matter of comity but is jurisdictional. Furthermore, that this

complete control excludes the officers of such corporation and every other person from interfering or intermeddling with such corporate affairs.

Also that these conclusions are a departure from the accepted and usual course of judicial proceedings. *Porter* v. *Sabin,* 149 U. S. 473, 479 (cited in opinion), *In re Associated Oil Co.,* 271 Fed. 788, and other authorities cited in the Brief in Support of this Petition, hereto attached.

Third Assignment of Error

The court erred in its construction of the statute of Oklahoma, relating to the extension of the life of a dissolved corporation by amended articles of incorporation, and in conflict with the decision of the Supreme Court of Oklahoma in the recent case of *Loeffler* v. *Federal Supply Co.,* 187 Okla. 373, 102 Pac. (2d) 862, the only case construing said statute. This case specifically limits the privilege of such revival to cases "where it has at all times operated as a going concern, and no steps toward winding up its affairs have been taken prior to the revival or renewal of its corporate existence" (Syl. 2), whereas the record in this case clearly shows that the Oklahoma Corporation had long been stripped of its working capital and abandoned by the defendants and that definite steps had been taken in the state court, a court of competent jurisdiction, to wind up its affairs prior to the attempted revival or renewal.

Fourth Assignment of Error

The court erred in its conclusion of law, that, although the minority stockholders had a right to begin this suit, the action has since abated in some way.

Petitioners are unable to determine from the language used in the two last paragraphs of the opinion (R. 246-247) whether it was the holding of the court that upon the appointment of a receiver in the case the principal suit automatically abated, making it necessary for the receiver in the case to institute a new action or that it was the holding of the court that upon the appointment of the receiver in the case it was necessary that the receiver be substituted as plaintiff or that permission of the court be secured for the further prosecution of the suit by the minority stockholders and that the failure of the minority stockholders to do one of these things abated the suit.

Either conclusion of law is contrary to the following decisions from other circuits:

Boston Elevated Ry. Co. v. *Paul Boyton Co.*, 211 Fed. 812 (First Circuit).

Missouri, K. & F. Trust Co. v. *German National Bank*, 77 Fed. 117, 122 (Eighth Circuit).

Hartford Accident & Ind. Co. v. *Federal Bond & Mtg. Co.*, 59 Fed. (2d) 950 (Eighth Circuit).

These cases hold that upon the appointment of a receiver for a corporation, a suit for or against the corporation does not abate. In the absence of a statute requiring a substitution, it may continue under the names of the

original parties and a substitution of the receiver for the corporation is not necessary.

It is not clear from the opinion, whether the court meant that the suit abated before or after removal to the federal court, but the Oklahoma rule on this point is the same as the federal rule. *Savoy Oil Co.* v. *Emery,* 137 Okla. 67, 74, 277 Pac. 1029, 1035.

Petitioners claim that it is the usual and accepted course of judicial procedure, and, as far as their examination of authorities has disclosed, the universal practice in minority stockholders' suits for the action to proceed in the name of the original plaintiffs even though a receiver is subsequently appointed in the case, unless the court for some special reason, in its discretion, makes the substitution, but that cases where the courts have exercised such discretion are extremely rare. In addition to the cases above cited, the brief in support of this petition cites other authorities.

SPECIAL PLEA TO THE DISCRETION OF THE COURT

It may be argued that even though the Circuit Court has erred in its conclusions of law, that these petitioners may accept these erroneous conclusions and follow them and still secure relief by making a demand upon A. C. Fletcher receiver of the "revived" Oklahoma Corporation to institute a new suit in behalf of the "revived" corporation for the wrongs complained of, although approximately

four years have elapsed since these petitioners instituted their minority stockholders' suit.

This argument would disregard all of the rights and advantages accruing to these petitioners by the timely institution of this suit, among which are the following:

1. Petitioners began this suit as soon as the frauds were discovered, so that laches could not be charged against them. Such a defense might be set up against a receiver who has been such for almost four years.

2. Petitioners succeeded in having process served on three important nonresident defendants—Ellsworth Jordan, one of the statutory trustees and upon P. R. Mesta and Mrs. George Tyson, two of the majority stockholders. There is no assurance that these nonresident defendants would again be subject to the process of the court in a new action.

3. The most important advantage was the assertion of liens on most valuable property. For instance, in Count 7 of the complaint (R. 61-73) it is charged that $1,190,000 of the funds of the Oklahoma Corporation were secretly and fraudulently diverted to the erection of the Skirvin Tower and that this structure was in fact an annex to and an integral part of the valuable Skirvin Hotel owned by the Texahoma Realty Company, one of the majority stockholders (R. 28). It was prayed that the court in its equitable jurisdiction decree both the Skirvin Tower and the Skirvin Hotel as one property and that an equitable lien or trust be impressed upon this property in favor of petitioners to the extent of this vast investment in this property. This

constituted *lis pendens* notice to all who might subsequently deal with this property. The timely assertion of this interest constituted a valuable priority which would be lost if petitioners are compelled to rely on another suit to be brought in the future.

Another and perhaps the most important reason why petitioners believe that this honorable court should exercise its discretion to review this case is from the standpoint of orderly equitable procedure.

If it becomes the pronounced law in this circuit that after the officers and statutory trustees of an expired corporation have stripped it of its capital and abandoned it (all of which is admitted by defendants' motions) and after the minority stockholders have pursued the only remedy which they had by instituting a suit in a court of competent jurisdiction to compel an accounting by the wrongdoers and to wind up the affairs of the dissolved corporation and have secured the appointment of a receiver to displace the wrongdoers as corporate officers—if after these things have occurred, it is the announced law that these wrongdoers may defeat the jurisdiction of the court and the control of the court over the *res* by the device of reviving the corporation and putting the affairs of the corporation back in themselves as officers and directors without the knowledge or consent of the court—then such a suit by minority stockholders would be futile. All of the advantages of their diligence in asserting their rights would be lost. Such a rule would be a positive deterrent against scattered minority stockholders incurring the expense of such a futile gesture for the redress of the wrongs. This is contrary to

the policy of courts of equity to make remedies for wrongs convenient and at all times available to those who have been wronged and to reward diligence in the assertion of rights.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the United State Circuit Court of Appeals for the Tenth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled *B. W. Coyle et al., Appellants,* v. *W. B. Skirvin et al., Appellees,* No. 2342, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code Section 240, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

W. H. BROWN,
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JAMES E. ANDERSON,
Counsel.